

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA, NO. CR. 03-0095 WBS

Plaintiff,

v.

AMR MOHSEN,

Defendant.

MEMORANDUM AND ORDER RE:
DEFENDANT'S MOTION FOR
DISCOVERY

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Following his indictment, trial, and conviction for perjury, obstruction of justice, contempt of court, and soliciting witness tampering and arson, petitioner Amr Mohsen filed a motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. (Docket No. 789.) Presently before the court is petitioner's motion requesting discovery that he claims is necessary to prepare a reply brief on his § 2255 petition. (Docket No. 810.)

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1 I. Procedural and Factual Background

2 In a two-phase jury trial, petitioner was found guilty
3 of crimes related to alleged perjury and obstruction of justice
4 in a patent infringement case and contempt of court (phase one),
5 and soliciting witness tampering and arson (phase two). During
6 the first phase of the trial, evidence was presented suggesting
7 that petitioner had fabricated an engineering notebook in the
8 underlying patent infringement case, testified falsely about the
9 notebook, and conspired with his brother to fabricate the
10 notebook and provide false testimony about it. The fabricated
11 notebook belonged to petitioner and relates to the underlying
12 civil patent and antitrust litigation between Aptix (of which
13 petitioner was the CEO) and QuickTurn.

14 Separate from the fabricated notebook, the government
15 also presented notes (the "Lobo notes") that appeared to record
16 what transpired at a meeting that occurred between petitioner and
17 Keith Lobo, QuickTurn's CEO, on August 19, 1996. (Rep.'s Tr.
18 ("RT") 147-49.)¹ According to the Lobo notes, petitioner
19 notified QuickTurn that it was infringing on the '069 patent at
20 that meeting. (RT 147-50.) Petitioner later produced the
21 falsified Lobo notes in the civil patent litigation to support
22 his claim that QuickTurn's violation of the patent was willful
23 and that treble damages should begin to run from the time that
24 petitioner claimed that he provided notice to QuickTurn on August
25 19, 1996. (RT 148-52.)

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28 ¹ Citation to the Reporter's Transcript, or RT, is used to reference the trial transcript. All citations to pre- and post-trial transcripts are referenced by date of the proceeding.

1 At trial, the government presented evidence that before
2 turning over the Lobo notes to Quickturn, petitioner sent
3 different versions of the notes to Robert Kuranz in Wisconsin to
4 see if Kuranz could date-test the ink. (RT 281-84.) The
5 government used this evidence to show that the Lobo notes were
6 falsified by petitioner in order to support his claim regarding
7 notice in the civil patent case and that the notes were not
8 actually written concurrently with the meeting in question.

9 The amended § 2255 petition raises claims of
10 ineffective assistance of counsel and failure of the government
11 to turn over exculpatory evidence. Petitioner claims that his
12 trial counsel failed to conduct discovery that would have shown
13 that the Lobo notes and misrepresentations regarding the notes
14 were not material and therefore did not support his convictions
15 for perjury, conspiracy to commit perjury, and obstruction of
16 justice. (Def.'s Am. Mot. to Vacate Convictions Per § 2255 ("Am.
17 § 2255 Pet.") at 2:19-14:13 (Docket No. 789).) Petitioner
18 specifically argues that his counsel should have "obtained Mr.
19 Lobo's deposition and related discovery materials from the patent
20 and antitrust cases to demonstrate that the meeting with Mr. Lobo
21 actually occurred and that Quickturn knew of the issuance of
22 Aptix's patent in 1996." (*Id.* at 12:3-5.)

23 Many of the documents in the underlying civil suits
24 were filed under a protective order requiring that protected
25 documents be identified as "For Attorneys Eyes Only." Prior to
26 the start of the criminal trial, petitioner's original counsel,
27 John Williams, stated that he had reviewed the files from the
28 civil case and noticed that many of them were sealed. The

1 government did not object at that time to unsealing the
2 documents, but noted that QuickTurn objected to having a
3 competitor review the documents. (Sept. 9, 2003, Tr. at 1-4.)
4 Judge Alsup, who was still presiding over the case at the time,
5 suggested that petitioner's counsel make a motion to unseal the
6 material that appeared to be valuable. (*Id.*) Petitioner's
7 counsel withdrew prior to filing any such motion and petitioner's
8 subsequent counsel did not move to lift the protective order.

9 In opposition to the amended § 2255 petition, the
10 government notes in passing that "because Mohsen has not provided
11 the Lobo deposition as an exhibit to this motion, it is pure
12 speculation that the Lobo deposition establishes that the meeting
13 actually occurred." (US's Opp'n to § 2255 Mot. at 52:2-4 (Docket
14 No. 805).) Based on this statement, petitioner argues that
15 whether there was a meeting on August 19, 1996, and when
16 QuickTurn received notice of the patent infringement are issues
17 of factual dispute that cannot be answered without access to the
18 files in the underlying civil cases. (Mot. for Discovery at 2:2-
19 13.)

20 Petitioner now moves the court to lift the protective
21 order in the underlying civil cases so that petitioner may review
22 all of the documents filed in the patent and antitrust suits that
23 are in the possession of the liquidator of Howrey & Simon, the
24 law firm that represented Aptiz in both civil suits. (*Id.* at
25 8:18-9:2.) In the alternative, petitioner suggests that such
26 extensive discovery would not be necessary if QuickTurn (now
27 Cadence Design Systems) will confirm (1) whether a meeting
28 between Mr. Lobo and petitioner took place on or about August 19,

1 1996, and (2) whether QuickTurn received notice of infringement
2 of the '069 patent at that meeting or by any other means at or
3 near that date. (Id. at 9:3-19.)

4 In addition to the government's opposition to
5 petitioner's motion for discovery, the court has received a
6 statement from Cadence Design Systems ("Cadence") regarding the
7 motion. (Docket No. 820.) Cadence acquired QuickTurn in 1999
8 and therefore owns all of QuickTurn's proprietary business
9 information pertaining to the antitrust and patent issues.
10 (Statement by Third Party at 2:1-6 (Docket No. 820).) Cadence
11 does not take a position as to whether petitioner's discovery
12 request is legally appropriate, but notes that any such discovery
13 would present a disclosure issue and that Cadence should be able
14 to review any documents that petitioner would like to publically
15 use to determine whether the documents contain information that
16 is still confidential. (Id. at 2:19-3:3.) Cadence does object
17 to petitioner's alternative discovery proposal, which would
18 require interrogatories and requests for admission from Cadence,
19 but further notes that even if such discovery were legally
20 permissible, Cadence does not possess the institutional knowledge
21 to respond to such requests. (Id. at 3:4-12.)

22 II. Discussion

23 "A habeas petitioner, unlike the usual civil litigant
24 in federal court, is not entitled to discovery as a matter of
25 ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997).
26 Rule 6 of the Rules Governing Section 2255 Proceedings provides
27 for discovery as follows:

28 (a) Leave of Court Required. A judge may, for good

cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law. . . .

(b) Requesting Discovery. A party requesting discovery must provide reasons for the request. The request must also include any proposed interrogatories and requests for admission, and must specify any requested documents.

Section 2255 R. 6. Good cause exists "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." Bracy, 520 U.S. at 909-10 (quoting Harris v. Nelson, 394 U.S. 286, 300 (1969)) (alteration in original). "Denial of an opportunity for discovery is an abuse of discretion when the discovery is necessary to fully develop the facts of a claim." Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995).

Good cause does not exist, however, where the facts alleged do not demonstrate a basis for relief. See Hubanks v. Frank, 392 F.3d 926, 933 (7th Cir. 2004); United States v. Huner, No. CV 08-2369, 2009 WL 2509184, at *1 (D. Ariz. Aug. 17, 2009) (denying discovery because "[p]etitioner has not alleged facts which, if true, would demonstrate that he is entitled to relief"). The court need not "allow prisoners to use federal discovery for fishing expeditions to investigate mere speculation." Calderon v. U.S. Dist. Ct. N.D. Cal., 98 F.3d 1102, 1106 (9th Cir. 1996).

Petitioner's requested discovery on the Lobo notes is at least one step removed from the primary issue at trial, which was whether the engineering notebooks were fabricated and material to the underlying civil litigation. At trial, the

1 government presented overwhelming evidence establishing that the
2 notebooks were material to the civil litigation, but suggested
3 during closing arguments that the jury could also find the
4 notebook material because it provided evidence that the Lobo
5 notes, which petitioner used to establish treble damages in the
6 patent suit, were fraudulent.² (RT 1224-25.) Petitioner does
7 not argue that additional discovery on the facts underlying the
8 Lobo notes will show that they were not forged, but only that
9 they would not have been material in the civil litigation.

10 As to petitioner's Brady claim, that the government
11 failed to turn over exculpatory evidence regarding the Lobo
12 meeting, petitioner's request for discovery will not establish
13 whether the Lobo deposition was ever in the government's
14 possession. Petitioner's discovery request will only shed light
15 on whether the Lobo meeting took place and if notice of
16 infringement was provided at that time. This evidence will not
17 counter the government's evidence that it was not in possession
18 of the deposition during the pendency of the criminal case.
19 Accordingly, good cause does not exist for discovery on the basis
20 of petitioner's Brady claim.

21 As to petitioner's claim for ineffective assistance of
22 counsel, assuming the court were to permit petitioner his
23 requested discovery, at most the discovery granted might prove
24 that the Lobo meeting did take place and that QuickTurn did

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26 ² The Ninth Circuit Court of Appeals has already held
27 that the government's reliance on the Lobo notes during closing
28 arguments was proper and did not constitute constructive
amendment of the indictment. United States v. Mohsen, 587 F.3d
1028, 1031 (9th Cir. 2009).

1 receive notice of infringement either at or before the meeting
2 with petitioner. Petitioner's motion assumes that if there was
3 independent evidence supporting the facts alleged in the
4 falsified Lobo notes, the fabricated notes and his
5 misrepresentations regarding the notes would no longer have been
6 considered "material" in the civil case and therefore he might
7 have been acquitted. As this court noted during sentencing,
8 however, the falsification of the Lobo notes had independent
9 probative value, regardless of whether the meeting actually took
10 place, because they indicate that petitioner "felt that it was
11 necessary to fabricate the evidence in order to persuade the
12 trier of fact that the meeting did occur." (Jan. 5, 2007 Tr. at
13 84.)

14 For petitioner's perjury conviction, the jury did not
15 need to find that the falsified Lobo notes were actually relied
16 upon in the civil trial, only that the misrepresentation had a
17 natural tendency to influence the fact-finder's decision on an
18 issue which was relevant to the matters to be determined by the
19 fact-finder. See United States v. McKenna, 327 F.3d 830, 839
20 (9th Cir. 2003). Whether the Lobo notes were material was based
21 on their materiality when petitioner produced the notes and not
22 based on whether the notes actually influenced the civil
23 litigation. See id. Discovery showing that the Lobo notes would
24 not have been relevant during trial in the patent suit would
25 therefore be insufficient to show that the notes did not have a
26 natural tendency to influence the fact-finder's decision when
27 they were produced by petitioner at his deposition to support his
28 claim for treble damages.

1 Similarly, for petitioner's obstruction of justice
2 conviction the jury did not need to find that petitioner's
3 falsification of the Lobo notes actually served to obstruct
4 justice, only that petitioner acted with the intent to obstruct
5 justice. See United States v. Rasheed, 663 F.2d 843, 853 (9th
6 Cir. 1981) (noting that "actual obstruction is not an element of
7 proof"); cf. Osborn v. United States, 385 U.S. 323, 333 (1966).
8 The proposed discovery will not provide any additional
9 information as to petitioner's intent to obstruct justice when he
10 created the falsified Lobo notes. The possibility that evidence
11 regarding when QuickTurn received notice of infringement would
12 have rendered the Lobo notes unnecessary was therefore not
13 relevant to whether petitioner intended to influence the outcome
14 of the civil patent suit.

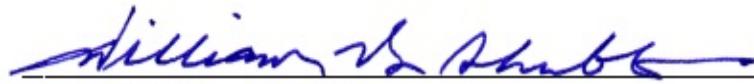
15 Finally, petitioner challenges the standing of the
16 government to oppose his motion for discovery. (Reply to Opp'n
17 to Mot. for Discovery at 3:24-5:18 (Docket No. 816).) Because
18 discovery is not automatic in § 2255 cases, petitioner would not
19 have been entitled to discovery simply because the government did
20 not oppose his motion. Regardless of whether the government had
21 standing to oppose the motion, petitioner bears the burden of
22 demonstrating good cause. See Stanford v. Parker, 255 F.3d 442,
23 460 (6th Cir. 2001). Petitioner has not met this burden,
24 therefore the question of whether the government had standing to
25 oppose the motion is irrelevant.

26 Because petitioner's requested discovery would not
27 provide evidence demonstrating that he is entitled to relief,
28 petitioner has failed to show good cause for the requested

1 discovery.

2 IT IS THEREFORE ORDERED that petitioner's motion for
3 discovery be, and the same hereby is, DENIED.

4 DATED: May 29, 2012

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6 WILLIAM B. SHUBB
7 UNITED STATES DISTRICT JUDGE

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